Journal of Law and Policy

Volume 29 | Issue 2 Article 3

6-3-2021

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LANDLORD BOUNTY HUNTERS: *QUI TAM* AS AN EFFECTIVE TOOL FOR HOUSING CODE ENFORCEMENT

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Millions of American renters live in substandard housing. Conditions in these homes not only affect individual renters' quality of life, but in the aggregate create enormous burdens on public resources in the form of higher healthcare costs, demand for public benefits, and lower economic productivity. Furthermore, the legacy of racist housing policies in the United States has concentrated poor housing conditions in low-income communities of color. This Note argues that existing methods of housing code enforcement are inadequate. Instead, housing advocates should turn to an ancient remedy that has been used to prosecute fraud, labor violations, and even pirates: qui tam *statutes.* Qui tam *statutes allow private parties to prosecute claims on behalf of the government and to collect a portion of the damages recovered. Currently, housing code enforcement relies on tenants to report code violations and to file suit when the landlord fails to correct conditions. A* qui tam *provision in the housing code would allow tenants to receive a percentage of the fines assessed against their landlord. Not only would this create stronger incentives for private parties to enforce the housing code, which promotes the public interest, it would also compensate tenants for the time and effort expended pursuing their right to a decent home.*

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[*] J.D. Candidate, Brooklyn Law School, 2021; B.A., Brooklyn College, 2014. Thank you to the members of the *Journal of Law and Policy* for their work preparing this Note for publication. I would also like to thank Justin La Mort, adjunct professor at Brooklyn Law School and supervising attorney at Mobilization for Justice, who helped me select this topic and provided substantive feedback. I also want to thank my parents, for always being in my corner, and my fiancé, Annie Zhang, for her unwavering encouragement and support.

INTRODUCTION

The Odimgbe family's housing conditions were unacceptable. The hallway outside their apartment contained broken light fixtures and exposed electrical wiring.[1] Inside their home, a busted heater spewed scorching steam into the air.[2] Plaster peeled off the bathroom walls and the hallway floor needed repair.[3] The apartment was also infested with mice and cockroaches.[4] When the landlord failed to correct violations issued for these conditions, the Odimgbe family filed suit in Brooklyn Housing Court to force the landlord to make repairs.[5] The lawsuit crawled through the courts for more than two years.[6] During that time, the tenants chose to fix many of the conditions themselves.[7] Once the repairs were completed, the landlord illegally evicted them from the apartment.[8] The court eventually found the landlord in contempt for violating orders to make the necessary repairs.[9] He was sentenced to imprisonment for twenty days and fined $1,000.[10] The court also levied civil penalties totaling $9,500 for violations of the housing code.[11] For the trouble suffered by the Odimgbe family, they received the maximum penalty the court could award for the landlord's contempt—$250.[12]

The Odimbge family's story is tragically unremarkable for low-income renters.[13] Millions of Americans live in substandard

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[1] Odimgbe v. Dockery, 582 N.Y.S.2d 909, 912 (Civ. Ct. Kings Co. 1992).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.* at 911.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* at 916.

[10] *Id.*

[11] *Id.* at 915.

[12] *Id.* at 916. *See also* N.Y. JUD. LAW § 773 (2020) (limiting penalties to $250, plus attorney's fees, when moving parties fail to show they are entitled to actual damages for injuries caused by the contempt of court).

[13] Emily A. Benfer & Allyson E. Gold, *There's No Place Like Home: Reshaping Community Interventions and Policies to Eliminate Environmental Hazards and Improve Population Health for Low-Income and Minority Communities*, 11 HARV. L. & POL'Y REV. S1, S3 (2017).

housing.[14] The effects of these conditions not only bear on individual tenants' quality of life, but also create enormous social costs in the aggregate—through higher healthcare costs and increased need for public benefits, as well as contributing to lower economic productivity.[15] This burden falls heavily on communities of color, where substandard housing is most concentrated due to America's history of racial segregation.[16] Furthermore, racist housing policies have laid the groundwork for the current housing crunch.[17] Today's affordability crisis is fueled by real estate speculators who see profits in blighted, urban neighborhoods where properties can be redeveloped for affluent, white newcomers.[18]

This Note argues that existing mechanisms for enforcing housing standards are inadequate. Instead, housing advocates should turn to an ancient remedy that has proven successful at prosecuting fraud, labor violations, and even pirates: *qui tam* statutes.[19] *Qui tam* is short for the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which translates to "he who brings an action for the king as well as for himself."[20] In a *qui tam* statute, the government allows private citizens to prosecute claims on its behalf and rewards them with a bounty that represents a portion of the damages.[21] A *qui tam* provision could empower tenants to act as Boba Fett-like[22] enforcers of the housing code by allowing them to

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[14] *Id.*

[15] *See infra* text accompanying notes 34–39.

[16] *See* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 50 (2017) (explaining how discriminatory housing policies and disinvestment contributed to the deterioration of African American homes, thus "reinforcing their neighborhoods' slum conditions").

[17] *See infra* text accompanying notes 61–68.

[18] *See infra* text accompanying notes 69–75.

[19] *See infra* Part III discussing other areas where *qui tam* has been applied.

[20] J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 551 (2000).

[21] Andrew Elmore, *The State Qui Tam to Enforce Employment Law*, 69 DEPAUL L. REV. 357, 368 (2020).

[22] Boba Fett is a fictional bounty hunter in the Star Wars franchise who captured the treacherous rogue Han Solo in order to collect the price on his head. STAR WARS: EPISODE V—THE EMPIRE STRIKES BACK (Lucasfilm Ltd. 1980).

exact a bounty in exchange for prosecuting their landlords' transgressions.[23]

Currently, enforcement agencies issue fines for violations of the local housing code.[24] Some jurisdictions allow tenants to sue if their landlord fails to remedy the violations.[25] However, the suit is merely a derivative claim on behalf of the government and any monetary penalties go the enforcement agency rather than the tenant.[26] A *qui tam* amendment to the housing code would allow tenants to claim a percentage of those fines as a reward for prosecuting their landlord's failure to make repairs.[27] Not only would this create stronger incentives for private parties to enforce the housing code, which promotes the public interest, it would also compensate tenants for some of the suffering caused by conditions in their home.[28]

Part I of this Note surveys housing conditions in the United States and examines the consequences of those conditions on affected tenants and on society at large. Part II describes current methods of housing code enforcement and why those methods have proved inadequate. Part III details how *qui tam* statutes work and how they have been applied in other areas of law. Part IV examines how a *qui tam* provision could be incorporated into a housing code as well as some of the drawbacks that could result from a *qui tam* provision.

I. THE STATE OF HOUSING IN THE UNITED STATES

In 2019, the U.S. Census Bureau recorded more than 3.3 million renters living in substandard housing conditions.[29] If these

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[23] *See* discussion *infra* Part IV.

[24] Marilyn L. Uzdavines, *Barking Dogs: Code Enforcement Is All Bark and No Bite (Unless the Inspectors Have Assault Rifles)*, 54 WASHBURN L.J. 161, 163 (2014).

[25] N.Y.C. ADMIN. CODE § 27-2115(h) (2020).

[26] Amsterdam v. Goldstick, 519 N.Y.S.2d 334, 336 (N.Y. Civ. Ct. 1987).

[27] *See* discussion *infra* Part IV.

[28] *See* discussion *infra* Part IV.

[29] *See American. Housing Survey 2019*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/ahs/data/interactive/ahstablecreator.html (last visited Oct. 17, 2020). (select area: "National;" select year: "2019;"

households were located in a single municipality, it would be America's third-largest city.[30] Some of the conditions recorded included lack of heat, inadequate plumbing, peeling paint, deficient electrical wiring, and vermin.[31] Substandard housing is most concentrated in low-income communities of color.[32] These areas are more likely to have older housing stock that require greater upkeep than newly constructed homes.[33] Moreover, some tenants in substandard housing simply cannot afford to move elsewhere and fear retaliation from their landlord if they complain.[34]

The effects of substandard housing can have long-lasting consequences for tenants' quality of life.[35] The presence of mold, moisture, and poor air quality can contribute to severe asthma.[36] A survey by the Center for Disease Control linked home environment to 40% of childhood asthma cases.[37] In fact, housing conditions are behind a range of health problems, such as respiratory disease, neurological disorders, psychological dysfunction, and the spread of communicable disease.[38] One of the most harmful conditions related to substandard housing is lead-poisoning.[39] Because lead paint was not prohibited until 1978, this condition is most concentrated in

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select table: "Housing Quality;" select tenure filter: "Renter;" click "Get table") (recording more that 3.3 million severely and moderately inadequate rentals).

[30] *See 500 Largest Cities,* by State and Population*, CTR. FOR DISEASE CONTROL, https://www.cdc.gov/places/about/500-cities-2016-2019/pdfs/500-cities-by-state.pdf (last visited Feb. 28, 2021) (showing the current third largest city is Chicago, which has a population of 2.6 million).

[31] *See* U.S. CENSUS BUREAU, *supra* note 29.

[32] Benfer & Gold, *supra* note 13, at S10.

[33] *See* ROTHSTEIN, *supra* note 16, at 65.

[34] PETER MOSKOWITZ, HOW TO KILL A CITY: GENTRIFICATION, INEQUALITY, AND THE FIGHT FOR THE NEIGHBORHOOD 183 (2017).

[35] Dayna Bowen Matthew, *Health and Housing: Altruistic Medicalization of America's Affordability Crisis*, 81 LAW & CONTEMP. PROB. 161, 166 (2018).

[36] Emily A. Benfer, *Health Justice: A Framework (and Call to Action) for the Elimination of Health Inequality and Social Justice*, 65 AM. U.L. REV. 275, 296 (2015).

[37] Megan Sandel & Matthew Desmond, *Investing in Housing for Health Improves Both Mission and Margin*, 318 J. AM. MED. ASS'N 2291, 2291 (2017).

[38] Matthew, *supra* note 35, at 166.

[39] Benfer, *supra* note 36, at 293.

older housing stock.[40] Lead paint flakes can be inhaled by residents, causing severe health complications.[41] Lead poisoning affects many important body functions, such as the cardiovascular, reproductive, immune, nervous, digestive, kidney, and renal systems.[42]

The burden of poor housing can also result in economic harm.[43] The stress of living in unsafe housing has been linked to cognitive and psychological problems.[44] A study by the United States Housing Corporation concluded that poor housing reduces worker output.[45] The report detailed how household conditions—such as inadequate plumbing, poor lighting and ventilation, overcrowding, poor drainage, and structural defects—lower productivity by causing workers to feel "cheerlessness" as well as "nervous fatigue and sleeplessness."[46] These problems also affect the household's children, who report trouble concentrating in school because of environmental stresses.[47]

In the aggerate, these problems have enormous social costs. Asthma alone costs the economy $56 billion each year.[48] It also contributes annually to fourteen million missed school days, two million emergency room visits, and 500,000 hospitalizations.[49] Lead poisoning also has an enormous impact on society.[50] Researchers estimate that lead poisoning has lowered America's population IQ

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[40] *Id.* at 293–94.

[41] Benfer & Gold, *supra* note 13, at S5.

[42] *Id.*

[43] Matthew, *supra* note 35, at 181.

[44] Ericka Petersen, *Building a House for Gideon: The Right to Counsel in Evictions*, 16 STAN. J. CIV. RTS. & CIV. LIBERTIES 63, 69 (2020).

[45] U.S. DEP'T OF LABOR BUREAU OF INDUS. HOUS. & TRANSP., REPORT OF THE UNITED STATES HOUSING CORPORATION: WAR EMERGENCY CONSTRUCTION VOL. 1, 1-2 (1920).

[46] *Id.* at 2.

[47] Samiya A. Bashir, *Home Is Where the Harm Is: Inadequate Housing as a Public Health Crisis*, 92 AM. J. PUB. HEALTH 733, 737 (2002).

[48] Benfer & Gold, *supra* note 13, at S7.

[49] Tracey Ross et al., *Creating Safe and Healthy Living Environments for Low-Income Families*, CTR. FOR AM. PROGRESS 3 (July 20, 2016, 12:01 AM), https://www.americanprogress.org/issues/poverty/reports/2016/07/20/141324/creating-safe-and-healthy-living-environments-for-low-income-families/.

[50] Benfer, *supra* note 36, at 295.

by five points.[51] This has doubled the number of people who qualify for special education and has been linked to an additional $11–53 billion in healthcare costs, $165–233 billion in lost lifetime earnings, and $25–35 billion in lost tax revenue.[52] Furthermore, those whose homelife causes them to miss out on academic or work opportunities are more likely to require public assistance, creating an additional social cost.[53]

The concentration of substandard housing in communities of color is a consequence of America's shameful history of racial segregation.[54] As Richard Rothstein details in *The Color of Law*, African Americans were barred from moving into white neighborhoods through explicitly racist zoning laws and racial covenants.[55] When the Supreme Court found these practices unconstitutional, municipalities were able to achieve the same result by enacting exclusionary zoning ordinances to block construction of affordable housing that could be rented by Black families.[56] Furthermore, the Federal Housing Administration ("FHA"), created by the Roosevelt Administration in 1934, began a process of "redlining" neighborhoods with Black residents, thereby making those areas ineligible for federally subsidized mortgages.[57] The FHA encouraged banks to issue mortgages for newly built housing in the suburbs and to avoid lending in urban areas.[58] The agency reasoned that the denser, older housing stock in cities was a riskier investment.[59] These policies combined to accelerate white flight to suburbs while African Americans were confined to urban ghettos where much of the housing stock was older and in disrepair.[60]

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[51] *Id.*

[52] *Id.*

[53] *See* Kathryn A. Sabbeth, *(Under)Enforcement of Poor Tenants' Rights*, 27 GEO. J. POVERTY L. & POL'Y 97, 106–07 (2019).

[54] *See* ROTHSTEIN, *supra* note 16, at 50.

[55] *Id.* at 44.

[56] *Id.* at 45, 48.

[57] *Id.* at 64–65.

[58] *Id.* at 65.

[59] *Id.*

[60] *Id.* at 65, 75, 186.

This history explains why the burden of hazardous conditions falls most heavily on people of color.[61] Segregation has made Black tenants vulnerable to predatory real estate practices.[62] Landlords can charge high rents and neglect to make repairs when their tenants have few alternatives for housing.[63] In some cases, landlords deliberately let their buildings deteriorate until they become uninhabitable.[64] At one Virginia development, a court in 2018 placed an apartment complex in receivership in order to prevent further deterioration of the property.[65] More than a quarter of the complex's 900 units had already been condemned, placing many residents at risk of homelessness; but the owners, who for years aggressively pursued rent while refusing to make repairs, were able to escape liability by hiding behind a limited liability company.[66] Economists call this process "filtering,"[67] which describes how a home, as it ages, filters down lower price tiers until it is eventually demolished or abandoned.[68]

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[61] Petersen, *supra* note 44, at 108.

[62] On July 10, 1966, Martin Luther King Jr. gave a speech about housing discrimination at Chicago's Soldier Field in which he stated: "We are here today because we are tired. We are tired of being seared in the flames of withering injustice. We are tired of paying more for less. We are tired of living in rat-infested slums and in the Chicago Housing Authority's cement reservations. We are tired of having to pay a median rent of $97 a month in Lawndale for four rooms, while whites in South Deering pay $73 a month for five rooms." Betsy Schlabach, *"Our Emancipation Day": Martin Luther King Jr. in Chicago*, BLACK PERSPECTIVES (Apr. 5, 2018), https://www.aaihs.org/our-emancipation-day-martin-luther-king-jr-in-chicago/.

[63] MOSKOWITZ, *supra* note 34, at 38.

[64] Robin Powers Kinning, *Selective Housing Code Enforcement and Low-Income Housing Policy: Minneapolis Case Study*, 21 FORDHAM URB. L.J. 159, 169 (1993).

[65] Kelly Avellino, *New Hope for Embattled Richmond Flats at Ginter Park Apartments*, NBC12 (July 19, 2018, 2:15 PM), https://www.nbc12.com/story/38683234/new-hope-for-embattled-richmond-flats-at-ginter-park-apartments/.

[66] *The Scarlet E, Part III: Tenants and Landlords*, WNYC STUDIOS: ON THE MEDIA (June 21, 2019), https://www.wnycstudios.org/podcasts/otm/episodes/scarlet-e-part-iii-tenants-and-landlords.

[67] H. Laurence Ross, *Housing Code Enforcement and Urban Decline*, 6 J. AFFORDABLE HOUS. & CMTY. DEV. L. 29, 40 (1996).

[68] *Id.* at 41.

Geographer Neil Smith observed how the filtering process creates an opportunity for real estate speculators.[69] When a property depreciates in value because its landlord neglected to make repairs, there is a higher profit potential for developers who purchase the property in advance of gentrification.[70] Smith examined tax records in certain New York City neighborhoods and found that those neighborhoods gentrified after buildings reached "their highest level of tax debt."[71] As author Peter Moskowtiz observed, this behavior signaled that landlords were "milking [their] buildings by not doing repairs or paying their taxes in preparation for flipping them."[72] His findings were supported by a subsequent study conducted by the University of Chicago Booth School of Business.[73] Researchers found that when a gentrifying neighborhood was near a poor neighborhood and a middle-class neighborhood, the poor neighborhood would gentrify faster.[74] This suggests low-income neighborhoods are more attractive to investors because there is an opportunity for a higher rate of return.[75]

II. CURRENT APPROACHES TO ENFORCING HOUSING STANDARDS

A. Housing Codes

Housing codes were introduced to interrupt the process of urban decay.[76] New York City passed America's first housing code when it adopted the Tenement House Act of 1867.[77] The law created

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[69] *See* Neil Smith, *Gentrification and Uneven Development*, 58 ECON. GEOGRAPHY 139, 149 (1982).

[70] *Id.*; *see also* BOYZ N THE HOOD (Columbia Pictures 1991) (containing a scene in which Furious explains how gentrification occurs when real estate interests bring down property values in Black neighborhoods so that residents can be moved out and the land resold at a profit).

[71] MOSKOWITZ, *supra* note 34, at 39.

[72] *Id.* at 38.

[73] Veronica Guerrieri et al., *Endogenous Gentrification and Housing Price Dynamics* 25 (Nat'l Bureau of Econ. Rsch., Working Paper No. 16237, 2010).

[74] *Id.*

[75] MOSKOWITZ, *supra* note 34, at 106.

[76] Ross, *supra* note 67, at 41.

[77] *Id.* at 31.

requirements for residential buildings to have proper sanitation facilities, fire safety standards, and access to light and air in each apartment.[78] Since that time, the city's housing code evolved to cover a variety of quality-of-life issues, such as mold, adequate heating, proper locking mechanisms, hot water, smoke detectors, illegal basement dwellings, and vermin eradication.[79] Similar measures have been adopted in most American cities.[80]

However, the agencies charged with enforcing housing codes often have inadequate resources to enforce the law.[81] Some communities have only a handful of officials tasked with investigating complaints.[82] At one time, Lexington, Kentucky had two officials dedicated to housing code enforcement for its population of 300,000 residents.[83] In Cincinnati, Ohio, a single housing inspector was responsible for managing cases at 600 properties.[84] In New York City, one of the country's most progressive jurisdictions when it comes to tenants' rights,[85] there were 333 inspectors devoted to housing code enforcement in 2018.[86]

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[78] *See id.* (describing how the Tenement House Act of 1867 set standards for "roofs, ventilation, toilets, fire escapes, garbage receptacles, and other related matters").

[79] *HP Actions (For Repairs and Services)*, MET COUNCIL ON HOUSING, https://www.metcouncilonhousing.org/help-answers/hp-actions-for-repairs-and-services/ (last visited Nov. 27, 2020).

[80] Ross, *supra* note 67, at 29.

[81] Uzdavines, *supra* note 24, at 169.

[82] *Id.*

[83] *Id.* at 170.

[84] *Id.*

[85] Oksana Mironova, *Right to Counsel and Stronger Rent Laws Helped Reduce Evictions in 2019*, CMTY. SERV. SOC'Y (Feb. 24, 2020), https://www.cssny.org/news/entry/right-to-counsel-and-stronger-rent-laws-helped-reduce-evictions-in-2019#:~:text=New%20York%20was%20the%20first,the%20law%20is%20growing%20nationwide (detailing how New York City was the first jurisdiction in the country to guarantee legal representation for low-income tenants facing eviction).

[86] N.Y.C. DEP'T OF HOUS. PRES. AND DEV., REPORT OF THE FINANCE DIVISION 24 (Mar. 22, 2019), https://council.nyc.gov/budget/wp-content/uploads/sites/54/2019/03/806-HPD-2020.pdf.

However, those inspectors were responsible for responding to 530,619 complaints.[87]

Most jurisdictions dedicate few resources to proactively searching for hazardous conditions.[88] Instead, the tenant must initiate the enforcement process by making a complaint.[89] When a complaint is made, a government agent comes to inspect the premises and issue violations for conditions that violate the code.[90] Typically, the landlord will have a certain number of days to correct the conditions.[91] If the conditions are not corrected within the specified frame, the agency responsible for housing code enforcement can bring an action to impose civil penalties against the property owner.[92] In cities such as New York, tenants can also bring an action against their landlord to impose penalties if the violations are not corrected.[93] However, such claims are derivative actions, meaning any fines assessed are awarded to the government, rather than the tenant, and the government may intervene at any time to settle the case without the tenant's consent.[94] A 2003 report by the City-Wide Task Force on Housing Court found that 82% of the cases brought to enforce New York's Housing Maintenance Code were tenant-initiated.[95] In these cases, few of the tenants were represented by an attorney, while the majority of landlords had counsel.[96] Because of this disparity, the report found there were numerous obstacles tenants had to overcome, such as repeatedly having to take time off work and arranging for child care because of adjournments requested by the landlord's attorney.[97] These obstacles serve to discourage tenants from bringing a case, thereby

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[87] *Id.*

[88] Uzdavines, *supra* note 24, at 163–64.

[89] *Id.* at 163.

[90] *Id.* at 164–65.

[91] *Id.* at 165.

[92] *Id.* at 167.

[93] *See* N.Y.C. ADMIN. CODE § 27-2115 (2020).

[94] Amsterdam v. Goldstick, 519 N.Y.S.2d 334, 336 (N.Y. Civ. Ct. 1987).

[95] CITY-WIDE TASK FORCE ON HOUS. CT., NO RAINBOW, NO GOLD: TENANT-INITIATED HP ACTIONS IN THE NEW YORK CITY HOUSING COURT 13 (May 2003), https://www.gothamgazette.com/graphics/HP_Actions_Report.pdf.

[96] *See id.* at 9.

[97] *Id.*

allowing unsafe housing conditions to continue unabated.[98] Furthermore, housing codes do not provide compensation to tenants who have suffered injuries as a result of their landlord's neglect.[99] Instead, victorious tenants simply win the safe housing conditions to which they were always entitled.[100]

B. Private Causes of Action

Tenants can bring private causes of action for damages caused by their landlords' failure to make repairs. In the 1970s, courts initiated a "revolution" in landlord-tenant law by borrowing doctrines from tort and contract law.[101] Previously, the tenant's duty to pay rent was independent of the landlord's obligation to maintain the premises.[102] Furthermore, the common law doctrine of *caveat lessee* shielded landlords from liability for injuries that occurred on leased properties.[103] Perhaps the most famous case to come out of the "revolution" in landlord-tenant law is *Javins v. First National Realty Corp.*, where the D.C. circuit court tied the duty to pay rent to the landlord's duty to make the premises habitable.[104] The court pointed out that the old common law rule made sense in an agrarian society, where the value of the lease was in the land.[105] However, the doctrine was unsatisfactory in a modern, urban environment, where it was understood that a lease for a residential unit conveyed a "package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and

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[98] *Id.* at 10.

[99] *See* Benfer & Gold, *supra* note 13, at S33.

[100] New Haverford P'ship v. Stroot, 772 A.2d 792, 795 (Del. 2001) (finding that the housing code imposed "a duty on landlords to maintain the leased premises in a safe, sanitary condition").

[101] Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145, 147–49 (2020).

[102] *Id.* at 154.

[103] Edward H. Rabin, *Symposium: The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 529 (1984).

[104] Alan M. Weinberger, *Teaching Property Law: Up from Javins: A 50-year Retrospective on the Implied Warranty of Habitability*, 64 ST. LOUIS U. L.J. 443, 443–44 (2020).

[105] Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir. 1970).

ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance."[106] The court fashioned a remedy through the implied warranty of habitability, which made the payment of rent dependent on the landlord's duty to maintain the premises.[107] Most damages for warranty of habitability claims are awarded in the form of a rent abatement, which is measured by the difference in value of the property in its current condition and its value as warranted.[108]

The old common law doctrine of *caveat lessee* also protected landlords from liability for injuries on their property.[109] *Sargent v. Ross* is the seminal case creating liability for landlords who fail to exercise reasonable care in making their properties safe for tenants.[110] The case allowed tenants to bring a cause of action in tort when they suffered an injury caused by their landlord's negligence.[111]

This seismic shift in the law during the 1970s was the fruit of sustained advocacy by tenant activists, lawyers, and scholars.[112] The implied warranty of habitability spread quickly throughout the country.[113] It has since been adopted by every state except Arkansas.[114] In many places, these changes were expected to supplement the local housing codes, which proved inadequate at forcing landlords to make repairs.[115] The advances in tort and contract law were expected to be more effective tools at reversing the urban decay that followed white flight.[116]

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[106] *Id.*

[107] *Id.* at 1082.

[108] Sabbeth, *supra* note 53, at 121–22.

[109] Sargent v. Ross, 308 A.2d 528, 534 (N.H. 1973).

[110] Rabin, *supra* note 103, at 529.

[111] *Sargent*, 308 A.2d at 534.

[112] Summers, *supra* note 101, at 153.

[113] *Id.* at 160.

[114] *Id.*

[115] *Id.* at 156, 161.

[116] *See id.* at 155–56, 161 (discussing how reforms to landlord tenant law were expected to reverse the urban decay that accompanied demographic shifts in the 1960s and 1970s).

Instead, the results have been disappointing.[117] One study in New York City housing court found that less than 2% of tenants who had a meritorious claim for warranty of habitability received a rent abatement.[118] Moreover, courts have proved ill-equipped at enforcing their orders to make repairs.[119] For those few tenants who successfully raised a warranty of habitability claim, the repairs were still outstanding at a subsequent court appearance in 72% of cases.[120]

Several reasons have been advanced for the lackluster performance of the warranty of habitability. In some instances, the problems are procedural. Some jurisdictions require notice to the landlord be provided through an official housing code violation report.[121] Therefore, the tenant cannot raise the doctrine even when the complaint to the landlord was recorded in a letter or email.[122] Other jurisdictions require that the tenant withhold rent in "good faith" to force the landlord to make repairs.[123] This means the warranty of habitability is unavailable for tenants who have fallen behind on rent for other reasons, but whose living conditions could have entitled them to an abatement.[124] Another obstacle particularly burdensome for low-income tenants is a requirement that the tenant deposit rent in an escrow account in order to raise a warranty of habitability defense in an eviction proceeding for unpaid rent.[125] In such a case, a tenant would be unlikely to have money to put in escrow, especially when the money that would have gone toward rent was used to cope with conditions of disrepair—such as by purchasing heaters, hot plates, or replacing damaged possessions.[126]

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[117] Serge Martinez, *Revitalizing the Implied Warranty of Habitability*, 34 NOTRE DAME J.L. ETHICS & PUB. POL'Y 239, 240 (2020).

[118] Summers, *supra* note 101, at 150.

[119] *Id.* at 151.

[120] *Id.*

[121] *Id.* at 164.

[122] *Id.*

[123] *Id.* at 162.

[124] *Id.*

[125] *Id.* at 163.

[126] *Id.*

Furthermore, some courts have walked back some of the advances made in tenants' rights during the 1970s.[127] For example, a New York appellate court, in *Beck v. J.J.A. Holding Corp.*, came to the fantastical conclusion that mold is not a foreseeable consequence of flooding, effectively kneecapping future tort claims against landlords who fail to remedy water damage at their properties.[128]

Another obstacle to the success of private enforcement actions is the way contract and tort law devalues poor persons' claims.[129] Law Professor Kathryn Sabbeth argues in her article, (*Under)enforcement of Poor Tenants' Right*s, that poverty in itself is an obstacle to housing justice.[130] She points out that the "prevailing methods for calculating damages incorporate biases of class, race, and gender, and they underestimate the value of poor tenants' cases."[131] Sabbath notes that those able to afford legal representation are also able to avoid substandard housing conditions.[132] By contrast, low-income tenants need to resort to contingency fees to induce representation from private attorneys.[133] However, this is difficult because damages are often related to the claimant's social position.[134] For example, if conditions cause the tenant to miss work, damages will be much higher for a professional than an hourly worker making minimum wage.[135] Furthermore, higher earners can expend funds to mitigate their injuries—such as moving to a hotel or ordering take-out food—that can be recouped in a tort claim.[136] Poor tenants are also less likely to own possessions of significant value that will result in meaningful damage awards if those items are destroyed.[137]

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[127] Benfer & Gold, *supra* note 13, at S36.

[128] Beck v. J.J.A. Holding Corp., 785 N.Y.S.2d 424, 425 (N.Y. App. Div. 2004).

[129] Sabbeth, *supra* note 53, at 121.

[130] *Id.* at 101.

[131] *Id.* at 103.

[132] *Id.* at 120.

[133] *Id.* at 121.

[134] *Id.* at 123.

[135] *Id.*

[136] *Id.* at 124.

[137] *Id.* at 123.

This means that when tenants raise tort and warranty claims, it is often as a defense in eviction cases.[138] This limits the effectiveness of the claim because the landlord has a strategic advantage in choosing when and where the lawsuit will take place.[139] Tenants facing eviction also have a weaker bargaining position because they risk losing their home and are therefore more amenable to compromising on their right to repairs.[140] This is particularly noteworthy for jurisdictions with right-to-counsel legislation because the right to an attorney is only guaranteed for low-income renters in eviction proceedings, not for affirmative cases requesting repairs.[141]

III. THE HISTORY AND APPLICATION OF *QUI TAM* STATUTES

In a *qui tam* action, the state assigns part of its interest to a private citizen, called a "relator," who prosecutes the claim on behalf of the state.[142] *Qui tam* statutes require the relator to have a special interest in the case, usually in the form of special knowledge about the alleged offense.[143] As a reward for prosecuting the claim, the relator is entitled to a portion of the damages.[144] The difference between *qui tam* and a private action is that the plaintiff is seeking to vindicate the rights of the state, instead of the individual's own rights.[145] The state will therefore always retain some interest and will have the right to intervene in the litigation.[146]

Qui tam statutes came to the United States from England, where they were in use for more than 1,000 years.[147] However, *qui tam* can

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[138] *Id.* at 142.

[139] *Id.* at 143.

[140] *Id.*

[141] *Frequently Asked Questions About RTCNYC*, RIGHT TO COUNS. NYC COAL., https://www.righttocounselnyc.org/faq (last visited Mar. 19, 2021).

[142] Elmore, *supra* note 21, at 368.

[143] *Id.* at 371.

[144] *Id.* at 368.

[145] *Id.*

[146] *Id.* at 361.

[147] *See* Richard A. Bales, *A Constitutional Defense of Qui Tam*, 2001 WIS. L. REV. 381, 385 (2001) (explaining that one of England's earliest *qui tam* provisions became law in the year 695).

be traced back to Ancient Rome, which offered private citizens a reward for successfully prosecuting criminals.[148] In England, some of the first *qui tam* provisions were used to enforce laws that prohibited labor on the Sabbath and maintained price controls for certain goods.[149] Another statute maintained limits on wages.[150] British Parliament viewed rising wages caused by a labor shortage during the plague as a form of "economic opportunism by the working classes."[151] The law's *qui tam* provision sought to recruit informers to help enforce the wage controls.[152]

Qui tam maintained its popularity in the New World.[153] Several of the colonies had *qui tam* laws on the books.[154] In 1692, New York passed the Act for the Restraining and Punishing of Privateers and Pirates, which allowed private citizens to bring *qui tam* actions against public officers who failed to carry out their duty to pursue pirates.[155] After the American Revolution, the new government enacted several *qui tam* laws and would continue to pass *qui tam* provisions throughout the nineteenth century.[156] Four of these remain in force.[157] The federal False Claims Act ("FCA")—used to prosecute fraud against the federal government—is the most notable surviving *qui tam* statute in the United States.[158] Many states also have their own version of the FCA.[159] In fact, *qui tam* has experienced a revival among state governments during the twenty-first century.[160] It has been proposed in the areas of consumer protection, housing and employment discrimination laws, and

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[148] *Id.* at 385.

[149] *Id.*

[150] Beck, *supra* note 20, at 570.

[151] *Id.*

[152] *Id.*

[153] Bales, *supra* note 147, at 387.

[154] *Id.*

[155] *Id.* at 387 n.36.

[156] *Id.* at 387.

[157] *Id.*

[158] *Id.* at 388.

[159] Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 955–56 (2007).

[160] Elmore, *supra* note 21, at 359.

safety-and-health standards.[161] California has had success enforcing its labor code through a *qui tam* statute called the Private Attorney General Act of 2004 ("PAGA").[162]

Over the years, federal *qui tam* statutes have survived several constitutional challenges.[163] Most recently, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, where the Supreme Court held that the FCA did not violate the Constitution's Article III standing provision.[164] The court determined that the FCA satisfied the standing requirement because the government made a partial assignment of its claim to the relator, who may pursue the claim with or without the government's intervention.[165] While the issue of Article III standing discussed in *Vermont Agency of Natural Resources* is only applicable to federal laws, state *qui tam* statutes would be subject to the Constitution's Article III standing requirements if they were brought in federal court.[166] Furthermore, State *qui tam* statutes are constrained by the Due Process Clause of the Fourteenth Amendment and the Excessive Fines Clause of the Eighth Amendment when the penalties are punitive in nature.[167]

Qui tam statutes fall into two categories: (1) those that allow injured parties to bring a claim on behalf of the state (as well as their own interests) and (2) those that allow informers to obtain a portion of the penalty as a bounty, even if the private actor did not suffer any injury.[168] The first category is called an "aggrieved party" statute.[169] The second category is called a "whistleblower" statute.[170] The FCA is the leading example of a whistleblower

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[161] *Id.* at 361.

[162] *Id.* at 372.

[163] *See, e.g.*, Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774 (2000) (determining that a relator has standing to sue on behalf of the United States under the FCA); United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 545 (1943) (finding that qui tam suits seeking civil penalties for criminal conduct did not violate the Double Jeopardy Clause of the Constitution).

[164] *Vt. Agency of Nat. Res.*, 529 U.S. at 778.

[165] *Id.* at 773–74.

[166] Elmore, *supra* note 21, at 392.

[167] *Id.* at 403.

[168] *Id.* at 368.

[169] *Id.*

[170] *Id.*

statute, while PAGA is an example of an aggrieved party statute.[171] As such, it is instructive to examine the mechanics of each of these laws in greater detail.

A. Federal False Claims Act

The FCA allows for the prosecution of those who commit fraud against the government.[172] Because it is a whistleblower statute, instead of an aggrieved party statute, it is not necessary for relators to have suffered an injury. Instead, they are required to be an "original source" of information about the alleged fraud[173]—a provision aimed at preventing relators from profiting from prosecutions already undertaken by the government.[174] The relator serves the complaint on the government, rather than the defendant.[175] After receiving the complaint, the Attorney General has sixty days to decide whether to intervene.[176] Following the sixty-day period, the government may intervene only after a showing of "good cause."[177] If the government intervenes, it bears the primary responsibility of prosecuting the case.[178] The relator will maintain an interest and collect up to 25% of the award.[179] If the Attorney General declines to intervene, the relator may proceed on its own and collect up to 30% of the award if the claim is successful.[180]

The FCA was originally enacted in 1863 in order to stop "massive frauds" committed by defense contractors during the Civil War.[181] Congress believed public officials suspected of perpetuating the frauds would be unwilling participants in prosecution efforts and added a *qui tam* provision to incentivize citizens to act as private

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171 *Id.* at 368–69.
172 31 U.S.C. § 3729.
173 *Id.* § 3730(e)(4)(B).
174 Bales, *supra* note 147, at 389.
175 31 U.S.C. § 3730(b)(2).
176 *Id.*
177 *Id.* §§ 3730(b)(2), (c)(3).
178 *Id.* § 3730(c)(1).
179 *Id.* §§ 3730(c)(1), (d)(1).
180 *Id.* § 3730(d)(2).
181 Bales, *supra* note 147, at 388.

attorneys general.[182] As originally written, the FCA allowed for double damages, imposed a mandatory $2,000 civil penalty for each claim, and allowed relators to claim one-half of the award.[183] The government was allowed to intervene at any time and for any reason.[184] However, following World War II, the role of the federal government expanded, creating more opportunities for private actors to abuse the statute. Because the law did not require the relator to possess independently obtained information, informers would rush to file claims as soon as criminal indictments issued.[185] Congress responded to this activity by rewriting the FCA to reduce relator awards and prohibit *qui tam* actions based on public knowledge.[186] This last change effectively ended *qui tam* action through the FCA because courts interpreted the new language to bar any claims based on information known to the government, even when that knowledge was known to the government only because the relator reported it.[187]

However, public outrage during the 1980s at reports of Defense Department spending on $435 hammers, $640 toilet seat covers, and $7,622 coffee makers, caused lawmakers to revisit the FCA's *qui tam* provision.[188] In order to crack down on these excessive payments to defense contractors, in 1986 Congress increased the financial incentives for relators to bring a claim.[189] More importantly, the ban on claims based on information already known to the government was watered down so that claims were barred only when they were based upon "publicly disclosed" information from (1) a criminal, civil, or administrative hearing, (2) a congressional or General Accounting Report, hearing, audit, or investigation, or (3) the news media.[190] Furthermore, *qui tam* actions under the FCA could be based on publicly disclosed information

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[182] *Id.* at 388–89.

[183] *Id.* at 389.

[184] *Id.*

[185] *Id.*

[186] *Id.* at 389–90.

[187] *Id.* at 390; *see also* U.S. *ex rel.* Moore & Co., P.A. v. Majestic Blue Fisheries, LLC, 812 F.3d 294, 297–98 (3d Cir. 2016).

[188] Beck, *supra* note 20, at 561.

[189] *Id.* at 561, 562.

[190] *See* 31 U.S.C. § 3730(e)(4)(A).

when the relator was an "original source" of the information.[191] These changes were effective in encouraging the private bar to litigate FCA claims.[192] In 2017, the Department of Justice reported that whistleblowers were responsible for $3.4 billion of the $3.7 billion in settlements and judgements for claims of fraud against the federal government.[193] The lion's share of the cases were for healthcare (generally Medicare and Medicaid) fraud.[194]

B. California's Private Attorney General Act of 2004 ("PAGA")

PAGA allows workers who allege violations of the state's labor code to pursue civil penalties against their employer.[195] Unlike the FCA, which requires relators to have unique knowledge of the offense, PAGA limits assignment to aggrieved employees.[196] The statute allows a victorious relator to claim 25% of the penalty, as well as attorneys' fees.[197] The relator must notify California's Labor and Workforce Development Agency ("LWDA"), as well as the employer, about the workplace violations.[198] The LWDA has sixty-five days to decide whether to intervene.[199] The agency may not intervene once the initial review period has passed.[200] For some violations, the employer has an opportunity to cure before the PAGA claim can proceed.[201] Furthermore, PAGA does not allow *qui tam* claims for technical violations of the Labor Code, such as

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[191] *Id.*

[192] Elmore, *supra* note 21, at 369.

[193] *Id.*

[194] Deborah R. Farringer, *From Guns that Do Not Shoot to Foreign Staplers: Has the Supreme Court's Materiality Standard Under Escobar Provided Clarity for the Health Care Industry About Fraud Under the False Claims Act?*, 83 BROOK. L. REV. 1227, 1236 (2018).

[195] Cal. Lab. Code §§ 2698–2699.6 (2020).

[196] Elmore, *supra* note 21, at 368, 371.

[197] Cal. Lab. Code §§ 2699(i), (g) (2020).

[198] *Id.* § 2699.3(a)(1)(A) (2020).

[199] *Id.* § 2699.3(a)(2)(B).

[200] *Id.* § 2699.3(a)(2)(A).

[201] *Id.* § 2699.3(c)(2).

violations related to posting, notice, agency reporting, or filing requirements.[202]

California enacted PAGA in 2003.[203] Its legislature fashioned the law in response to findings that the LWDA had been grossly ineffective at enforcing the state's labor laws.[204] The state had allocated more than $42 million and 460 employees to labor code enforcement,[205] and despite these resources, reports indicated rampant abuse of the state's wage and hour laws.[206] One report by the U.S. Department of Labor estimated there were 33,000 ongoing wage violations by employers in the Los Angeles garment industry.[207] However, fewer than 100 wage citations were being issued per year in the entire state.[208]

Since its enactment, PAGA has become enormously popular.[209] During its initial year, the state collected $20,900 in PAGA penalties.[210] That number increased to $34,640,059 in fiscal year 2017–2018.[211] On average, there are between 4,000–7,000 PAGA claims filed by relators each year.[212] This is more than twice the number of actions by the California Bureau of Field Enforcement, which is charged with identifying employment law violations.[213]

Other states have considered passing statutes similar to PAGA.[214] Most of these proposals followed the United States Supreme Court's ruling in *Epic Systems v. Lewis*, which found that the Federal Arbitration Act authorized employment contracts mandating individual arbitration for any employee-employer

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[202] *Id.* § 2699(g)(2).

[203] Ivan Munoz, Note, *Has PAGA Met Its Final Match? Continued Expansion of California's Private Attorneys General Act Leads to Trade Group's Constitutional Challenge*, 60 SANTA CLARA L. REV. 397, 403 (2020).

[204] *Id.* at 401.

[205] *Id.*

[206] *Id.* at 401–02.

[207] *Id.* at 401.

[208] *Id.*

[209] *Id.* at 399.

[210] *Id.*

[211] *Id.*

[212] Elmore, *supra* note 21, at 372.

[213] *Id.*

[214] *Id.* at 387–88.

disputes.[215] This holding significantly curtailed a worker's ability to bring a class action against their employer—thereby making it cost prohibitive for many workers to hire an attorney to litigate their individual grievance.[216] In response to the holding in *Epic Systems*, legislatures in seven states began exploring *qui tam* employment statutes modeled after PAGA.[217]

While state *qui tam* statutes, such as PAGA, would not be subject to Article III scrutiny in state courts, they must avoid violating the Fourteenth Amendment's due process protections, which do not allow grossly excessive punishments, and the Eighth Amendment's Excessive Fines Clause.[218] The California legislature sought to avoid violating these rights by including language in PAGA that allows courts to lower awards when the amounts are "unjust, arbitrary and oppressive, or confiscatory."[219] The law also attempts to avoid due process violations by preventing redundant claims, meaning that a PAGA judgement is binding on any aggrieved party not involved in the proceeding, including the government.[220]

IV. APPLYING *QUI TAM* TO HOUSING CODE ENFORCEMENT

In the same way that California was unable to adequately enforce its labor codes before PAGA's enactment,[221] municipalities across the United States are currently struggling to enforce their housing codes.[222] A *qui tam* provision would ramp up enforcement by creating financial rewards for parties who sue to force their landlord to make repairs.[223] This would promote the public interest: it would reduce the enormous social costs associated with poor housing and reverse the process of divestment and deterioration that

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[215] *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018).

[216] Elmore, *supra* note 21, at 387.

[217] *Id.* at 387–88.

[218] *Id.* at 395, 403.

[219] *Id.* at 404.

[220] *Id.* at 405.

[221] Munoz, *supra* note 203, at 401.

[222] Uzdavines, *supra* note 24, at 169.

[223] *See* Beck, *supra* note 20, at 562; *see also* Munoz, *supra* note 203, at 401.

makes communities vulnerable to gentrification.[224] Moreover, in some jurisdictions, converting existing housing codes to include *qui tam* provisions would be relatively simple. Tenants can already bring a claim on behalf of the government through a derivative action.[225] A *qui tam* provision would simply allow those tenants to keep a percentage of the penalties.[226] The following sections explore these issues in greater detail.

A. A Qui Tam *Provision Would Be Fair for Tenants*

The current system is heavily dependent on tenants to pursue the public's interest in preventing unsafe housing conditions.[227] Jurisdictions rely on tenant complaints to locate violations.[228] Furthermore, tenants initiate many of the enforcement actions against landlords who fail to correct violations.[229] To successfully prosecute these claims, tenants must overcome numerous obstacles: they must take time off work, pay fees, and respond to changes in the court's schedule.[230] The state provides no compensation for these efforts,[231] even though they promote a public good.[232]

Better enforcement would arguably reduce some of the social costs associated with bad housing, such as higher healthcare and public benefit payments, as well as lower economic productivity.[233] Furthermore, aggressive prosecution efforts would bring in more

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[224] *See supra* Part I (discussing the social costs of substandard housing).

[225] N.Y.C. ADMIN. CODE § 27-2115 (2020).

[226] *See supra* Part III (discussing how *qui tam* allows relators to claim a portion of the award).

[227] *See* Uzdavines, *supra* note 24, at 169; CITY-WIDE TASK FORCE ON HOUS. CT., *supra* note 95, at 13 (discussing how housing code enforcement relies on tenants to make complaints and sue for repairs).

[228] Uzdavines, *supra* note 24, at 163–64.

[229] CITY-WIDE TASK FORCE ON HOUSING COURT, *supra* note 95, at 13.

[230] *Id.* at 9.

[231] *See* Benfer & Gold, *supra* note 13, at S33.

[232] *See* Benfer, *supra* note 36, at 295 (describing the social costs associated with poor housing conditions).

[233] *See* Benfer, *supra* note 36, at 295; Sabbeth, *supra* note 53, at 107; U.S. DEP'T OF LABOR, *supra* note 45, at 3 (discussing the social costs of substandard housing).

government revenue through civil penalties.[234] A *qui tam* provision in the housing code would recognize and reward the public good advanced by tenants who pursue their right to repairs.[235] The money could go towards compensating *pro se* tenants for their time and effort bringing the claim, or could be used to hire an attorney.[236]

B. Qui Tam *Would Help Tenants Finance Their Enforcement Actions*

As explained by Professor Sabbeth, biases of class, race, and gender in contract and tort law undervalue damage awards for poor tenants.[237] The low dollar amounts of these awards make it difficult for tenants to finance their lawsuits through contingency fees.[238] This means that those who are most in need of legal remedies—low-income tenants of color who are more likely to live in substandard housing—are in the worst position to bring lawsuits.[239]

This situation could be different with a *qui tam* provision, even without a requirement that the landlord pay attorney fees.[240] For example, New York City can fine landlords up to $500 per day when a tenant is without heat and hot water.[241] In a case where there has been no heat for several months, a percentage of those fines would exceed the rent abatement a low-income tenant would likely obtain through the implied warranty of habitability.[242] Moreover, attorneys

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[234] *See* Munoz, *supra* note 203, at 399 (demonstrating how *qui tam* drastically increased revenue to the state through labor violations).

[235] *See supra* Part I (discussing the social costs of substandard housing).

[236] *See* CITY-WIDE TASK FORCE ON HOUSING COURT, *supra* note 95, at 9 (reporting that there were numerous obstacles tenants had to overcome, such as repeatedly having to take time off work and arranging for childcare because of adjournments requested by the landlord's attorney).

[237] Sabbeth, *supra* note 53, at 103.

[238] *Id.* at 120.

[239] *Id.*

[240] *See* CAL. LAB. CODE § 2699(g) (2020) (providing for attorney's fees to victorious relators).

[241] N.Y.C. Admin. Code §§ 27-2029, 27-2031 (2020).

[242] In October 2020, the average rent in Manhattan was $2,990. If a tenant was without hot water for three months, the fines could reach $45,000. In a *qui tam* statute that awarded the tenant 25% of the damages, the tenant could receive $11,250. This is greater than the maximum of $8,970 a tenant could receive if

could reap a high contingency fee by representing a group of tenants in a repair case against a slumlord.[243] Some cases where there were building-wide housing code violations resulted in penalties that exceeded $1 million.[244]

C. Qui Tam *Would Promote Housing Justice*

There are not only economic issues involved here. A *qui tam* housing provision could also promote housing justice. As discussed in Part I, racist housing policies have concentrated substandard housing in communities of color.[245] This has made minority communities vulnerable to the displacement that accompanies gentrification.[246] Aggressive code enforcement through *qui tam* legislation would be a powerful weapon against landlords who try to exploit tenants with limited housing options.[247] Furthermore, it could interrupt the filtering process that lays the groundwork for gentrification by preventing properties from deteriorating to the

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they lived in an averagely priced apartment and the abatement discounted their entire rent. *See* Eyewitness News, *Manhattan Average Rent Drops Below $3,000 for First Time in Nearly a Decade, Report Finds*, ABC7 (Oct. 23, 2020), https://abc7ny.com/manhattan-rent-apartments-for-average-in-new-york-city-midtown/7256900/ (reporting that the average rent in Manhattan in October 2020 was $2,990).

[243] *I.e.*, a landlord "who receives unusually large profits from substandard, poorly maintained properties." *Slumlord*, Merriam-Webster, https://www.merriam-webster.com/dictionary/slumlord (last visited April 18, 2021).

[244] A court found that a residential building had eighty-two open Class B violations, which required a penalty of $25 per violation and $10 per day, per violation, and those violations were not corrected for 444 days, resulting in a penalty of $366,130. There were also eleven open Class C violations, which required a penalty of $50 per violation and $125 per day, per violation, and those violations were not corrected for 461 days, resulting in a penalty of $634,425. The total fines amounted to $1,000,555. DHPD v. One 35 W. Corp., 9 N.Y.S.3d 592, 592 (N.Y. Civ. Ct. 2015).

[245] *See supra* text accompanying notes 61–68.

[246] *See* Schlabach, *supra* note 62 (comparing housing conditions in Black and White communities).

[247] *See* MOSKOWITZ, *supra* note 34, at 38 (describing how landlords can take advantage of tenants who have few alternatives for housing).

point where they must be destroyed or abandoned.[248] When combined with rent control or other forms of rent regulation—for example, those that limit evictions by requiring a showing of good cause—a *qui tam* housing code could be an effective tool for maintaining stable, healthy, and secure communities.[249]

D. What Would Qui Tam *Look Like in a Housing Code?*

A *qui tam* housing statute could be modeled on New York City's current Housing Maintenance Code.[250] New York City allows a tenant to bring a derivative claim on behalf of the city seeking an injunction requiring the landlord to make repairs and assessing civil penalties for failure to correct violations.[251] The tenant benefits from the repairs, but the fines are paid to the city.[252] A *qui tam* provision would tweak this situation so that claimants would be entitled to a portion of the penalties.[253] This would compensate the tenant for the costs of bringing the claim[254] as well as some of the injuries caused by the lack of repairs.[255] It would also recognize the tenant's good deed in promoting the public interest.[256]

Adapting housing codes to incorporate *qui tam* would seem to favor an aggrieved party statute, rather than a whistleblower statute.

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[248] *See* Smith, *supra* note 69, at 149 (explaining how "filtering" lays the groundwork for gentrification by reducing property values).

[249] *See* Vicki Been et al., *Symposium: One Hundred Years of Rent Control: An Examination of the Past and Future of Rental Housing: Article: Laboratories of Regulation: Understanding the Diversity of Rent Regulation Laws*, 46 FORDHAM URB. L.J. 1041, 1071–73 (2019) (discussing how rent control could work with housing codes to combat gentrification).

[250] *See* N.Y.C. ADMIN. CODE §§ 27-2001–27-2153 (2020).

[251] *Id.* § 27-2115 (2020).

[252] Amsterdam v. Goldstick, 519 N.Y.S.2d 334, 336 (N.Y. Civ. Ct. 1987).

[253] *See* Elmore, *supra* note 21, at 368 (describing how *qui tam* allows relators to keep a portion of the damages).

[254] *See* CITY-WIDE TASK FORCE ON HOUS. CT., *supra* note 95, at 9 (explaining the costs tenants bear bringing a suit to force repairs).

[255] *See* Benfer, *supra* note 36, at 295; Sabbeth, *supra* note 53, at 107; U.S. DEP'T OF LABOR, *supra* note 45, at 2 (describing the many injuries tenants experience as a result of substandard housing).

[256] *See* Benfer, *supra* note 36, at 295 (describing the social costs associated with poor housing conditions).

A whistleblower statute would require a more substantial overhaul of existing regulations. For example, New York City only gives standing for tenants and lawful occupants to bring a derivative case for housing repairs.[257] A whistleblower statute would therefore require amending the standing requirements in New York City's housing code. Furthermore, the law requires that a violation issue, usually in response to a tenant's complaint, and that the landlord have time to correct the violations before fines are assessed.[258] Housing code violations at individual addresses are easily accessible by the public through the website for the Department of Housing Preservation and Development.[259] Therefore, if the law were a whistleblower statute like the FCA, which precludes claims based on "publicly disclosed" information,[260] it would prevent anyone from bringing a *qui tam* claim. If the whistleblower statute were more permissive, like the pre-WWII version of the FCA, it could result in abuse.[261] People could comb through public records searching for uncorrected violations so that they could file a suit and claim the bounty. Therefore, an aggrieved party *qui tam* statute would be a better fit for housing codes.

A more nettlesome problem is how to apply the notice requirements common in *qui tam* statutes to housing code enforcement. The FCA and PAGA require the relator to give the responsible agency sixty and sixty-five days, respectively,[262] to decide whether to intervene. However, when it comes to housing conditions, that amount of time can have serious consequences for a tenant's health. In fact, for some immediately hazardous conditions, like lack of heat or hot water, the landlord is required to make repairs immediately or face serious fines.[263] This would weigh in favor of a short review period. Furthermore, the review period should be

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[257] N.Y.C. ADMIN. CODE § 27-2115 (2020).

[258] Uzdavines, *supra* note 24, at 163–69.

[259] *See HPD Online*, NYC HOUS. PRES. & DEV., https://www1.nyc.gov/site/hpd/about/hpd-online.page (last visited Nov. 29, 2020).

[260] Beck, *supra* note 20, at 562.

[261] *See* Bales, *supra* note 147, at 388–89 (explaining how the statute was abused).

[262] 31 U.S.C. § 3730(b)(2); CAL. LAB. CODE § 2699.3(a)(2)(B) (2020).

[263] N.Y.C. ADMIN. CODE § 27-2115 (2020); Dep't of Hous. and Dev. of the City of New York v. DeBona, 476 N.Y.S.2d 190, 190–91 (N.Y. App. 1984).

eliminated when the violations are immediately hazardous. However, the government could preserve its ability to intervene throughout the entire case. The ability to intervene would also help to prevent any due process or excessive fines violations that could occur as the result of an overzealous private attorney.[264]

E. Challenges of Applying Qui Tam *to Housing*

A *qui tam* housing statute would likely raise two issues of concern: (1) that the legislation will encourage frivolous lawsuits and (2) that landlords will pass the costs associated with stronger enforcement on to tenants.

Opponents of a *qui tam* housing statute could argue that it will encourage tenants to damage their homes in order to claim a financial reward.[265] There is some evidence to support this argument. An analysis of the FCA concluded that the *qui tam* provision encouraged a "significant number of frivolous suits."[266] Additionally, the analysis found that the Attorney General could have independently discovered and prosecuted many of the claims brought by relators.[267] These conclusions suggested that "the *qui tam* provision of the FCA is not as valuable in protecting the public interest as proponents claim, since it allows relators to receive funds that the government would otherwise earn."[268] However, the study's analysis of Illinois' false claims act revealed that the state attorney general failed to discover any fraud absent the help of relators.[269] Therefore, for states that lack the resources for effective enforcement, *qui tam* provisions have the potential to "greatly benefit the public interest."[270] Furthermore, in the case of housing

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[264] *See* Elmore, *supra* note 21, at 403 (describing how the Eighth and Fourteenth amendments constrain overzealous prosecution of state *qui tam* statutes).

[265] Burgess v. Meyer, 975 N.Y.S.2d 271, 273 (App. Div. 2013) (containing allegations from landlord that tenants created or exacerbated hazardous conditions in the home).

[266] Broderick, *supra* note 159, at 965.

[267] *Id.* at 976.

[268] *Id.* at 980.

[269] *Id.* at 992.

[270] *Id.* at 997.

code enforcement, the risk of frivolous lawsuits would be minimized by several provisions that already exist in New York City's Housing Maintenance Code. First, the Code requires a violation to issue from a government agency.[271] Therefore, the tenant cannot claim a bounty in an enforcement action until a government official has verified that violations exist. Second, New York City allows landlords to escape civil penalties when the tenant is responsible for the damage or the tenant has inhibited the landlord's attempts to make repairs.[272] These provisions would make it difficult for relators to pursue frivolous lawsuits under the housing code.

Another common objection to pro-tenant legislation is that costs will be passed on to the tenants.[273] Indeed, when New York passed the Housing Stability and Tenant Protection Act of 2019—a historic package of legislation aimed at closing loopholes used to displace low-income tenants—the state's most powerful real estate lobby warned that many properties would "fall into disrepair" because the new laws disincentivized landlords from maintaining their buildings.[274] In fact, the opposite occurred.[275] New York City experienced a decrease in housing code violations because landlords were no longer incentivized to harass tenants by neglecting repairs.[276] However, there is some evidence to support the assertion that enhanced housing code enforcement can increase rents.[277] A 2019 research paper analyzing building code violations in Chicago found that a 10% increase in resolved violations correlated with a

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[271] N.Y.C. ADMIN. CODE § 27-2115(b) (2020).

[272] *Id.* § 27-2116(b)(2)(iii) (2020).

[273] Daniel P. Schwallie, Note, *The Implied Warranty of Habitability as a Mechanism for Redistributing Income: Good Goal, Bad Policy*, 40 CASE W. RES. 525, 539 (1990).

[274] Sydney Pereira, *In Wake of New Rent Laws, Housing Maintenance Violations Decrease*, GOTHAMIST (Jan. 21, 2020, 12:33 PM), https://gothamist.com/news/wake-new-rent-laws-housing-maintenance-violations-decrease.

[275] *Id.*

[276] *Id.*

[277] ROBIN BARTRAM, THE COST OF CODE VIOLATIONS: HOW BUILDING CODES SHAPE RESIDENTIAL SALES PRICES AND RENTS 1 (July 24, 2019), https://nlihc.org/sites/default/files/Bartram_The-Cost-of-Code-Violations-How-Building-Codes-Shape-Residential-Sales-Prices-an-Rents.pdf.

5.5% increase in rents.[278] However, the study also showed that unresolved code violations had no statistically significant effect on rents.[279] Therefore, while tenants did pay higher rent for better housing, they received no benefit when the housing degraded.[280] Instead, those benefits went to the landlord who was able to avoid paying the cost of repairs without reducing the rent.[281]

CONCLUSION

A *qui tam* provision in housing codes will advance housing justice.[282] It would fairly compensate tenants for their injuries and for their enforcement efforts.[283] It would also be a powerful tool for vulnerable communities to fight back against slumlords and developers who seek to profit from America's racist housing system.[284] A *qui tam* housing statute would not only benefit the millions of Americans who live in substandard housing, but it could also lower aggregate social costs that affect everyone's well-being.[285] Furthermore, it would be relatively simple for some jurisdictions to implement a *qui tam* provision in their housing codes: they could simply alter their statutes to allow *qui tam* claims instead of derivative claims.[286] In addition to prosecuting fraud, labor violations, and pirates,[287] *qui tam* could also be used to improve housing.

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[278] *Id.* at 6.

[279] *Id.* at 7.

[280] *Id.*

[281] *See id.*

[282] *See supra* Part IV.C.

[283] *See supra* Part IV.B.

[284] *See* Sabbeth, *supra* note 53, at 119–20 (describing how vulnerable tenants, particularly low-income tenants of color, struggle to enforce their legal rights).

[285] *See supra* Part I (describing the burden substandard housing places on individuals and on society at large).

[286] *See supra* Part IV.D.

[287] *See supra* Part III (describing the historical applications of *qui tam*).